SHAYNE COREY CAHILL

v.

KAKA SINGH DHALIWAL

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[ORIGINATING SUMMONS NO: S1-24-1148-2003]
6 JANUARY 2005

ADMINISTRATIVE LAW: *Exercise of judicial functions - Domestic tribunal - Judicial review - Visiting jockey not given opportunity to mitigate sentence in breach of Malaysian Racing Association Rules - Whether rules provided for remedy - Whether subsequent remedial steps taken rectified breach*

ADMINISTRATIVE LAW: *Judicial review - Domestic tribunal - Scope of review - Whether if case involves right to earn livelihood and a correct interpretation of rules given - Lee v. The Showmen's Guild of Great Britain*

The plaintiff, an Australian professional jockey, was a visiting jockey in Malaysia approved by the Selangor Turf Club. The Selangor Turf Club was a member of the Malaysian Racing Association ('MRA') that regulated the profession of horse racing in Malaysia and Singapore. The plaintiff was disqualified from horse racing for a period of one-year and three-year respectively based on two charges brought against him before the Stipendiary Stewards. His appeals to the Racing Stewards as allowed under the MRA Racing Rules were dismissed and his convictions and sentences were upheld. He now brought an action against the defendant, a registered public officer of the MRA, claiming *inter alia* that he was not given an opportunity to mitigate sentence on appeal in respect of the second charge, and that there was impropriety between the Chief Stipendiary Steward and the Chairman of the Racing Steward in hearing the appeal. It was not disputed that the plaintiff earlier did not accede to the request by the Racing Stewards to attend a reconvened meeting to make submission on the appropriate sentence to be imposed.

Held (dismissing plaintiff's claim):

[1] Courts generally would not judicially review decisions of domestic tribunals except the correctness of the decision-making process. This is based on the principle that the private or domestic tribunals derive their authority from the contract entered into between the parties in dispute. As such, if the terms of the contract specify the setting up of a tribunal

to discipline a party to the contract then the party so called upon to be disciplined should not question the decision meted down by such tribunal. In the present case, the plaintiff, having been accepted as a visiting jockey by the Selangor Turf Club upon application, had agreed to abide by the MRA Racing Rules that had provision for disciplining the plaintiff. (p 151 f-h)

[2] The proposition expressed in *Lee v. The Showmen's Guild of Great Britain* had limited application. The court is only prepared to examine the correctness of the decision when the matter in contention involves "the right to earn a livelihood" and it is to see that the tribunal has given a "correct interpretation of the rules". It is only when these conditions arise will the courts proceed to examine the decision on its merits to see whether the tribunal has correctly interpreted the rules, otherwise the courts will only confine itself to review the decision-making process. (p 153 f-g)

[3] As the plaintiff and the Selangor Turf Club contracted to abide by the rules set out in the MRA Racing Rules, any breach of such rules, including that involving natural justice is a breach of the contract. However, the MRA Racing Rules provided a remedy for the party who had breached such rule to rectify the breach pursuant to r. 18(2)(c) of the said Rules. When a provision under an agreement permits a party who has made a mistake to rectify the breach committed, and step is taken to attempt to put this right, the said party cannot be said to have breached the agreement when the aggrieved party refuses such mistake to be corrected. In the present case, the defendant admitted that the Racing Stewards had committed an error. Immediately the plaintiff was informed of this with a request to attend a meeting to rectify the mistake and to give the plaintiff a chance to address the Racing Stewards regarding the appropriate sentence to be passed. Since the plaintiff chose to ignore such move, the defendant could not be accused of having breached the contract so as to warrant this court to find that the decision-making process was flawed. (p 155 b-e)

[4] If the plaintiff desired to prove the allegation of impropriety between the Chief Stipendiary Steward and the Chairman of the Racing Steward hearing the plaintiff's appeal, he would have accepted the defendant's offer to be supplied with the notes of evidence taken during the appeal before the Racing Stewards. It might contain materials to support that allegation or otherwise. However, with only a bare allegation of impropriety and a contradiction that such act did not take place, there was no alternative but to exclude from consideration such evidence. In any event, this accusation had become a non-issue with the Racing Stewards deciding to

reconvene the appeal to review their decision on sentence. But as the plaintiff refused to accept that, the plaintiff could not use this forum to knock out the entire disciplinary proceedings conducted by the Selangor Turf Club against him where his guilt was proved and the sentence which perhaps might be changed awaited his attendance. Otherwise it would remain in the hands of the Racing Stewards to reconsider. (pp 155 g-h & 156 a)

Case(s) referred to:
Chong Kok Lim v. Yong Su Hian [1979] 2 MLJ 11 ***(refd)***
Lee v. The Showmen's Guild of Great Britain [1952] 2 QB 329 ***(refd)***
Ng Kim Chor v. HR Hochstadt & Ors [1998] 7 MLJ 19 ***(refd)***
Singapore Amateur Athletics Association v. Haron Mundir [1994] 1 SLR 47 ***(refd)***
Woon Kwok Cheng v. HR Hochstadt & Ors [1997] 4 CLJ 106 HC ***(refd)***

For the plaintiff - S Selvi; M/s Gooi & Azura
For the defendant - G Rajasingam; M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

JUDGMENT

James Foong J:

Introduction

The plaintiff is an Australian. He is a professional jockey. He applied, and received approval from Selangor Turf Club to be a visiting jockey in March 2003. The Selangor Turf Club is a member of the Malaysian Racing Association (MRA) that regulates the profession and sport of horse racing in Malaysia & Singapore. By being accepted as a visiting jockey, the plaintiff has agreed to be bound by the MRA Racing Rules.

On 30 March 2003, the plaintiff rode a horse by the name of 'Kim Music' on the second day of the Selangor Racing Meet. Subsequent to this race, on 4 April 2003, he was charged before the Stipendiary Stewards for not taking all reasonable and permissible measures throughout the race to ensure that the said horse was given full opportunity of winning or of obtaining the best possible placing in the said race. The Stipendiary Stewards found him guilty and imposed upon him a 1-year disqualification from racing. He appealed to the Racing Stewards, as is allowed under the MRA Racing Rules. On 30 April 2003 his appeal was dismissed and his conviction and sentence (imposed by the Stipendiary Stewards) were upheld.

Before the above disciplinary action, the plaintiff participated in another race. This was the 4th race held on the 4th day of the Piala Emas Sultan Selangor Meet on 6 April 2003. At this race, he rode a horse named 'Jakisha'. And subsequently he was once again charged before the Stipendiary Stewards on 9 April 2003 for a similar sort of offence as described earlier. The particulars of this charge states:

(a) that having lost your off-side stirrup iron soon after the start, you make no serious attempt to regain its use. During this time you continually restrain your mount to the back of the field until approximately the 1000 meters mark, where it could not race to its best advantage.

(b) After entering the home straight in last position, you failed to ride with sufficient vigour and determination from the 300 meters mark to the finish when your mount was running on strongly.

He was found guilty and the punishment meted was a 3-year disqualification from racing to run consecutively after the 1-year suspension imposed for the earlier offence in respect of the horse, Kim Music. Besides, a fine of RM50,000 was also imposed. Dissatisfied, he appealed to the Racing Stewards. His appeal was heard on 20 June 2003 and was dismissed; the suspension and fine were maintained.

According to the plaintiff, the Racing Stewards, at the hearing of this appeal, had originally waived the fine but after the intervention of the Chief Stipendiary Steward, who acted as the prosecuting officer in this appeal, the fine was re-imposed.

Enclosure 1

Discontented with these, the plaintiff filed this action in encl. 1 for *inter alia:*

1. A declaration that the decisions of the Racing Stewards made on 20 June 2003 in respect of the 2 charges concerning horses Kim Music and Jakisha respectively are null and void for reason that the Stipendiary Stewards had not proved every ingredients of the charges against him.

2. In respect of the 2nd offence concerning horse Jakisha, the plaintiff contends that he was not given an opportunity to mitigate before the Racing Stewards confirmed the sentence imposed by the Stipendiary Stewards. This is wrong in law.

Events Subsequent To The Filing Of encl. 1

On 25 June 2003, the plaintiff applied for an interim injunction to restrain the defendant from enforcing the sentences meted by the Racing Stewards pending the disposal of encl. 1. He was partially successful. This court only granted his request in respect of the 2nd charge concerning the horse called Jakisha but not for the 1st charge associated with horse Kim Music.

Enclosure 1 was finally heard on 3 December 2004. By this time, the plaintiff was no longer desirous of continuing with this application concerning the 1st charge. And in respect of the 2nd charge, his counsel informed this court that the plaintiff would drop the allegation that all the ingredients for the 2nd charge were not proved. In short, the plaintiff would confine: (a) his claim on the failure of the Racing Stewards to allow him to mitigate before sentence and; (b) the impropriety which resulted in the re-imposition of the fine when it was originally waived.

Analysis

Before I proceed to analyze this case, it is necessary to explain the role of the defendant. He is a registered public officer of the MRA. In this capacity, the plaintiff has named him as the defendant under s. 9 of the Societies Act 1966.

Legal Principles To Be Applied

Before proceeding to analyze this case, it is necessary to ascertain what are the legal principles to be applied, particularly on the extent of indulgence in examining the decision of a domestic tribunal.

It is settled law that courts, generally, would not judicially review decisions of domestic tribunals except the correctness of the decision making process – see *Woon Kwok Cheng v. HR Hochstadt & Ors* [1997] 4 CLJ 106 and *Ng Kim Chor v. HR Hochstadt & Ors* [1998] 7 MLJ 19. The rational for this proposition is based on the principle that these private or domestic tribunals derive their authority from the contract entered into between the parties in dispute. As such, if the terms of the contract specify the setting up of a tribunal to discipline a party to the contract then the party so called upon to be disciplined should not question the decision meted down by such tribunal. For example, in this instance case, the plaintiff having been accepted as a visiting jockey by the Selangor Turf Club upon his application to be one has agreed to abide by the MRA Racing Rules, which has provision for disciplining the plaintiff. But not contended with this generally accepted practice that the court should only confine itself to examine the correctness of the decision making process rather than the correctness of the decision itself on merits, the

plaintiff's counsel attempts to convince me that this scope should be extended. The extent she said must be in line with what Lord Denning said in *Lee v. The Showmen's Guild of Great Britain* [1952] 2 QB 329:

> It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great as, if not greater than, any exercised by the courts of law. They ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers; but in practice they have no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee. Is such a tribunal to be treated by these courts on the same footing as a social club? I say no. A man's right to work is just as important to him as, if not more important than, his rights of property. These courts have intervened every day to protect rights to property. They must also intervene to protect the right to work. But the question still remains: to what extent will the courts intervene? They will, I think, always be prepared to examine the decision to see that the tribunal has observed the law. This includes the correct interpretation of the rules. Let me give an illustration. If a domestic tribunal is given power by the rules to expel a member for misconduct, such as her for 'unfair competition', does that mean that the tribunal is the sole judge of what constitutes unfair competition? Suppose it puts an entirely wrong construction on the words 'unfair competition' and finds a member guilty of it when no reasonable person could so find, has not the man a remedy? I think that he has, for the simple reason that he has only agreed to the committee exercising jurisdiction according to the true interpretation of the rules, and not according to a wrong interpretation ... This is a serious encroachment on his right to earn a livelihood, and it is, I think, not to be permitted unless justified by the contract into which he has entered. The courts have never allowed a master to dismiss a servant except in accordance with the terms of the contract between them. So also they cannot permit a domestic tribunal to deprive a member of this livelihood or to injure him in it, unless the contract, on its true construction, gives the tribunal power to do so.

According to plaintiff's counsel, this passage has been accepted in our Federal Court in *Chong Kok Lim & Ors. v. Yong Su Hian* [1979] 2 MLJ 11 @ 23.

But counsel for the defendant however repeatedly reminds me not to depart from the established principle and cited the case of *Singapore Amateur Athletics Association v. Haron bin Mundir* [1994] 1 SLR 47 @ 59 where the Singapore Court of Appeal reiterated that:

The jurisdiction of the courts in reviewing the decisions of domestic tribunals is clearly of a limited nature. The decision of such a tribunal cannot be attacked on the ground that it is against the weight of evidence. The function of the courts is to see that the rules of natural justice have been observed, and that the decision has been honestly arrived at. The court has no power to review the evidence for the purpose of deciding whether the tribunal came to a right conclusion. It is not the function of the court when exercising such supervisory jurisdiction to resolve issues of fact which are within the proper sphere of the tribunal's inquiry. See, eg, *Maclean v. Workers' Union* [1929] 1 Ch 602; *Leeson v. General Council of Medical Education and Registration* [1889] 43 Ch D 366. In the context of decisions of clubs, the position was stated succinctly long ago in the English Court of Appeal case of *Dawkins v. Antrobus* (1881-5) All ER Rep 126. We quote from the exemplary headnote:

> The court has no right to sit as a court of appeal from the decision of the members of a club duly assembled and acting according to the rules, provided that in arriving at that decision the principles of natural justice were observed, eg, where a member had been expelled from the club under a rule providing for the expulsion of a member guilty of conduct injurious to the character and interests of the club, that the member in question had been given proper notice of the meeting and an opportunity to attend it and be heard, and that the charges had been made against him, and the proceedings conducted, *bona fide*, fairly, and in the honest exercise of the powers given to the meeting by the club. These conditions having been fulfilled, the court has no right to consider whether or not what was done by the meeting was right or whether or not what was decided was reasonable.

In Malaysia, this approach seems to have been accepted as correct – see, Justice Nik Hashim judgment in *Ng Kim Chor v. HR Hochstadt & Ors (supra).* But having considered the authorities cited, it is my view that the proposition expressed in *Lee v. The Showmen's Guild of Great Britain (supra)* has limited application. As explicitly reminded by Lord Denning in that case, the court is only prepared to examine the correctness of the decision when the matter in contention involves "the right to earn a livelihood" and it is to see that the tribunal has given a "correct interpretation of the rules". It is only when these conditions arise, the courts will proceed to examine the decision on its merits to see whether the tribunal has correctly interpreted the rules otherwise, the courts will only confine itself to review the decision making process.

Has There Been A Breach Of Natural Justice In The Decision Making Process?

Having established the legal principles to be applied, I shall now proceed to analyze the facts of this case against these principles.

Since the plaintiff has withdrawn the accusation on the failure of the Chief Stipendiary Steward to prove all the ingredients of the charge, my consideration will be confined to the issue of whether the decision making process has been complied with, taking into consideration natural justice and honesty. There is no longer any issue on the correct interpretation of the rules.

In respect of the decision making process the complaint of the plaintiff centers primarily on two aspects: (a) that the plaintiff was not been given an opportunity to mitigate before sentence was announced by the Racing Stewards at the appeal stage; (b) is the accusation that the Chief Stipendiary Steward, who was the prosecuting officer in the appeal, has influenced the Chairman of the Racing Stewards to change his mind without consultation with other members of the Racing Stewards hearing the appeal to re-impose the fine of RM50,000 on the 2nd charge against the plaintiff.

It is not denied by the defendant that there was an error committed by the Racing Stewards during the appeal in not granting an opportunity to the plaintiff to mitigate before sentence was announced. But on the accusation of impropriety between the Chief Stipendiary Steward and the Chairman of the Racing Stewards relating to the re-imposition of the fine the defendant vehemently denies it.

On the first question concerning the error committed by the Racing Stewards, the defendant has attempted to rectify this by firstly admitting to the error soon after the decision on 20 June 2003. This was through a letter addressed to the plaintiff's solicitors dated 30 June 2003. This letter went further to inform the plaintiff that the Racing Stewards, who heard the appeal, wish to reconvene to review their decision on sentence since there was a misreading of r. 144(5) of the MRA Racing Rules which states that it is not mandatory upon the Racing Stewards to hand down a suspension of three years upon the plaintiff being found guilty of the charge. This rule only provides disqualification for a period "of not less than one (1) year and not more than three (3) years". A request was then made to the plaintiff to attend this reconvened meeting to make submission on the appropriate sentence to be imposed.

The plaintiff did not accede to this request by arranging to attend this review. Instead he demands the relevant remedies prayed for in encl. 1.

As the plaintiff and the Selangor Turf Club have agreed to be abide by the rules set out in the MRA Racing Rules, which forms part of their contract, any breach of such rules, including that involving natural justice, is a breach of the contract. But does the MRA Racing Rules provide a remedy for the party who has breached such rule to rectify the breach. The answer is in the positive. Rule 18(2)(c) MRA Racing Rules, grants the Racing Stewards "power at their absolute discretion, on their own motion, to review where justice requires or permits, their own previous decisions". Utilizing this provision, they have expressed desire to reconvene the hearing of the appeal and had requested the plaintiff to attend. Regrettably, the plaintiff has refused to cooperate to make arrangement to do so. When a provision under the agreement permits a party who has made a mistake to rectify the breach committed, and step is taken to attempt to put this right, then this party cannot be said to have breached any terms of the agreement when the aggrieved party refused such mistake to be corrected. Here the defendant has admitted that the Racing Stewards had committed an error. Immediately the plaintiff was informed of this with a request to make arrangement to attend a reconvene meeting to rectify the mistake and to give the plaintiff a chance to address the Racing Stewards regarding the appropriate sentence to be passed.

Since the plaintiff chose to ignore such move, the defendant cannot be accused of having breached any of the terms of the contract to warrant this court to find that the decision making process is flawed.

On the accusation of impropriety between the Chief Stipendiary Steward and the Chairman of the Racing Steward hearing the plaintiff's appeal, there was an express denial of this by the defendant. But plaintiff's counsel points out that the defendant is not in a position to say positively that such impropriety did not take place since the defendant was not personally present to witness this. Even if the defendant had relied on records to make this denial, the defendant did not disclose the source of his information.

I am surprised by this plaintiff's approach. I am of the view that if the plaintiff desired to prove the allegation of impropriety, he would have accepted the offer of the defendant to be supplied with the notes of evidence taken during the appeal before the Racing Stewards. It may contain materials to support this allegation or otherwise. But now with only a bare allegation of impropriety and a contradiction that such act did not take place, this court has no alternative but to exclude from consideration such evidence. In any event, this

accusation has become a non-issue with the Racing Stewards deciding to reconvene the appeal to review their decision on sentence. But as the plaintiff has refused to accept this, the plaintiff cannot use this issue in this forum to knock out the entire disciplinary proceedings conducted by the Selangor Turf Club against him where his guilt has been proven and the sentence, which perhaps may be changed, awaits his attendance; otherwise it would remain in the hands of the Racing Stewards to reconsider.

Conclusion

For reasons stated above, I hereby dismiss this plaintiff's claim with cost.